89-716

FILED
AUG 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

PAUL G. WATSTEIN

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeal
for the Federal Circuit

Attorney for petitioner:

PAUL H. GREISEN
GREISEN LAW CORPORATION
2230 L Street
Sacramento, CA 95816
(916) 447-2073

QUESTION PRESENTED

Whether the granting of defendant's motion for summary judgment may be based on the fact that plaintiff is unable to summarily prove each element of his case prior to trial?

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No.

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OCTOBER TERM 1989

PAUL G. WATSTEIN

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeal for the Federal Circuit, To the Honorable Chief Justice of the United States and To the Honorable Associate Justices ot the Supreme Court of the United States:

Paul G. Watstein, the Petitioner herein, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeal for the

Federal Circuit entered in the above-entitled action on May 31, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit entered May 31, 1989 is contained in Appendix A hereto.

The opinion of the United States Claims Court filed September 21, 1988 is contained in Appendix B hereto.

The opinion of the United States Court of Appeals for the Federal Circuit entered December 18, 1987 is contained in Appendix C, hereto.

The opinion of the United States Claims Court filed May 29, 1987 is contained in Appendix D, hereto.

JURISDICTION

The opinion of the United States

Court of Appeals for the Federal Circuit was entered on May 31, 1989.

The jurisdiction of the United States Supreme Court is involved under 28 United States Code §1254(1).

STATUTES INVOLVED

Air Force regulation 36-39 attached as Appendix E.

STATEMENT OF THE CASE

On October 27, 1986, plaintiff filed a petition in the United States Claims Court seeking back military pay and a correction of military records. (JA 5)

All references to JA are to the Joint Appendix filed with plaintiff's reply brief in the U.S. Court of Appeals for the Federal Circuit. Watstein v. U.S. 89-1100. Appellant has requested certification of the record below for transmission to this

Honorable Court.

Upon motion for summary judgment by the defendant and opposition and cross-motion for summary judgment by plaintiff, the Claims Court granted defendant's motion and dismissed plaintiff's complaint. (JA p.4) The basis of plaintiff's claim was that upon completion of Officer's Training School (OTS) on February 14, 1980, plaintiff was commissioned as a 2nd lieutenant pursuant to executive order AH-0874 and sworn in as the same. All necessary paperwork was completed including an AF133 form. Plaintiff was issued travel orders reflecting his commission as a 2nd Lieutenant. (JA p.5)

On March 21, 1980, plaintiff was informed during in-processing at Mather AFB, Sacramento, California, that he had

been administratively disenrolled from OTS on March 11, 1980, as a result of the faculty board's recommendation. (JA p. 7) The alleged disenrollment of plaintiff occurred after plaintiff had already graduated from OTS and had been sworn in as a 2nd lieutenant. In fact, the recommendation for disenrollment was not even made until five days after graduation and commissioning. (JA p.39 §1, p.53 §3)

No action has ever been taken by the U.S. Air Force or any entity to reduce plaintiff's grade from 2nd lieutenant. (JA p.7 §VIII) However, plaintiff has been deprived of the military pay and allowances commensurate with his true rank. (JA p.8 §XVI) Plaintiff has sought to have his military records corrected administratively, but the correction board (AFBCMR) rejected his claim. (JA p.43)

The defendant's motion for summary judgment was based on the grounds of laches and also on the merits. Plaintiff then submitted an opposition to defendant's motion and a cross-motion for summary judgment.

The U.S. Claims Court granted defendant's motion for summary judgment on May 29, 1987 based upon the merits while denying plaintiff's cross-motion, on the ground that plaintiff failed to substantiate any claim on the merits. The Claims Court denied defendant's motion with respect to laches, finding no monetary prejudice. (JA p.4)

Plaintiff appealed to the United States Court of Appeals for the Federal Circuit on July 17, 1987. (Plaintiff's Notice of Appeal Watstein v. U.S. 87-1472) The Appeals Court vacated the decision of

the Claims Court and remanded the case for reconsideration of the defense of laches, specifically non-monetary actual prejudice. The merits of the case was not considered by court. (Decision of the Court of Appeals, Watstein v. U.S. 87-1472, 12/18/87.) (Appendix C)

Further briefing was filed on the issue of laches. Defendant submitted a declaration of Capt. Steven J. Pecinovsky alleging the inability to locate certain documents.

The Claims Court reaffirmed its decision September 21, 1988, on the merits and found for defendant on the issue of laches based upon an asserted inability of defendant to locate a log book that would have evidenced the execution of Plaintiffs AF 133 Form and the inability to locate an amendment to special order AF 0874.

(September 1, 1988, Order of the Claims Court) (Appendix B)

Plaintiff again appealed to the United States Court of Appeals for the Federal Circuit.

On May 31, 1989 the Appeals Court affirmed the decision of the Claims Court on the merits finding that plaintiff had failed to prove that the AF 133 Form was executed or that plaintiff took the required oath. (Appendix A)

Although specifically remanded previously for reconsideration of the issue of laches, the issue was not addressed by the Appeals Court, apparently not reached in view of the finding on the merits.

REASON FOR GRANTING WRIT

The failure of plaintiff to prove his case summarily does not relieve defendant of its burden to prove absence of material

fact and entitlement to judgment as a matter of law.

The United States Court of Appeals for the Federal Circuit affirmed the decision of the Claims Court based upon plaintiff's lack of evidence proving that an AF 133 Form was executed and that plaintiff took the required oath.

Plaintiff does not have to prove the execution of an AF 133 Form and taking of the oath in order to defeat defendant's motion for summary judgment.

Plaintiff may have to prove the above in order to prevail on his own motion for summary judgment but he does not have to prove the above to defeat defendant's motion for summary judgment. Plaintiff need only raise a triable issue of material fact in order to defeat defendant's motion.

On motion for summary judgment

the court cannot try issues of fact, but must only determine whether there are issues of fact to be tried. Summary judgment is not a substitute for trial. Only when it is quite clear what the truth is and that no genuine issue remains is summary judgment proper. Short v. Louisville & N.R. Co. (1962, Ed Tenn.) 213, F Supp 549, 550

Summary judgment should not be granted unless the entire record shows movants right to judgment with such clarity as to leave no room for controversy and establishes affirmatively that the adverse party cannot prevail under any circumstances. Prince v. Pittston Co. (1974) 63 FRD 28, 32.

The standard of proof which plaintiff must meet as set forth in Sanders v. United States, (1979) 595 F2d 804, 811

provides:

"That the Correction Board's decision was illegal because it was arbitrary or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced and money is due."

In this case, plaintiff is prepared to meet this burden, however, he is unable to prove his case summarily.

Plaintiff contends that the correction board's decision was illegal because it is contrary to any law or regulation. Plaintiff bases this claim on the fact that there was no evidence that he was not commissioned as an officer in the same manner as the other students with whom he attended OTS. He attended the graduation ceremony, special order AH 0874 ordered his commissioning, he was sworn in as a 2nd Lieutenant and was issued all

paperwork, identification and travel orders after being sworn in as a 2nd Lieutenant.

Defendant has failed to offer any evidence that plaintiff was treated any different from the other members of his OTS class until after graduation and commisioning. It is not until five days after plaintiff and all other members of his class graduated and were commissioned that plaintiff was recommended for disenrollment.

Since plaintiff was processed and commissioned in the exact manner as all other members of his class on February 14, 1980, the subsequent acts of a faculty board recommending plaintiff for disenrollment operating retroactively is a nullity.

Plaintiff knows of no provision for the retroactive disenrollment of a

commissioned officer by a faculty board, nor has defendant offered evidence of the existence of such a provision.

The Appellate Court's decision is based upon a factual determination that plaintiff adamently disputes i.e., whether an AF 133 Form was ever executed and whether plaintiff took the required oath.

As noted, plaintiff has maintained from the outset that he was processed in the same manner as all other members of his class including attendance of all commissioning ceremonies and completion of all necessary paperwork which necessarily includes an AF 133 Form.

The Appellate Court indicates that there was no evidence that an AF 133 Form was executed or that he took the required oath.

Defendant has never even

contended that the above did not occur. Defendant has merely alleged an inability to locate documents evidencing such acts.

Plaintiff has merely been unable to prove summarily that it did in fact occur because no AF 133 form is currently contained in plaintiff's file.

On motion for summary judgment the moving party has the burden of proof. The moving party must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law even though the opponent to summary judgment would have the burden of proving facts alleged at trial. Doff v. Brunswick (1966) 372 F2d 801, 807. Massaro v. Vernitron Corp. (1983) 559 F Supp 1068, 1073.

The opposing party should be given the benefit of every reasonable

inference that can be made from evidence in his favor. Pennsylvania v. Curtiss Nat. Bank (1970) 427 F2d 395, 400.

In considering a motion for summary judgment the courts must not try issues of fact, its function is limited to deciding whether there are any issues to be tried and must resolve all ambiguities and draw all inferences in favor of the party opposing summary judgment. United States v. Bosurg (1976) 530 F2d 1105, 1110.

To defeat a motion for summary judgment the opposing party does not have to prove that factual inferences drawn by the moving party are incorrect but merely that contrary inferences might be permissible United States v. General Motors (1974) 65 FRD 115, 119.

The trial of issues of fact on motion for summary judgment is improper.

Such facts may be proven at trial. Klein v. Lionel Corp. (1955) 18 FRD 184, 185.

The party moving for summary judgment bears the burden of demonstrating the absence of genuine issues of fact and that he is entitled to judgment as a matter of law even if the opposing party comes forth with nothing. Summary judgment must be denied if the moving party fails to establish nonexistence of material issue and entitlement to judgment as a matter of law. Bloomgarden v. Coyer (1973) 479 F2d 201, 206 Ozark Milling Co. v. Allied Mills Inc. (1973) 480 F2d 1014, 1015

Although unable to prove his commission summarily, there is clearly sufficent information contained in the record to put the matter at issue.

There was more than one reference in the record that did indicate a Form 133

was executed. In the reponse to plaintiff's Inspector General Action Request, (App. 37 - §2a), the Deputy Inspector General stated:

" . . Orders appointing OTS graduates as second lieutenants, identification cards and travel orders are prepared in advance at OTS to expedite the movement of graduates after course completion. The AF Form 133, which you stated was destroyed during your out-processing would have been void if not completed by the person administring the oath. Since you do not remember who signed the AF Form 133, we have no way to find out if it was in fact accomplished with the intent to commission you. . ."

In addition, the report of Jon R. McMurty of the Inspector General's Office (App 39 §3) also makes reference to the fact that " - - AF Form 133 was probably completed in advance." Plaintiff is prepared to prove the destruction of his AF 133 Form at trial as well as all elements entitling him to judgment.

CONCLUSION

Plaintiff is prepared to meet his

burden of demonstrating error. Plaintiff has apparently been unable to prove his case summarily. The inability of plaintiff to prove his case summarily does not establish defendant's case. Defendant has not proved and plaintiff has not conceeded that an AF 133 Form was not ever executed or that plaintiff did not take a required oath.

Whether an AF 133 Form was ever executed and whether plaintiff took all required oaths is clearly a question of fact which plaintiff should be afforded an opportunity to prove at trial. Plaintiff has raised a clear triable issue of fact and should not be denied a trial merely because he was unable to prevail in his own motion for summary judgment.

DATED: 9-11-89

Respectfully submitted,

Paul H. Greisen

PAUL H. GREISEN

EXHIBITS

Exhibit A - OPINION ANNOUNCING JUDGMENT OF THE COURT

Exhibit B - JUDGMENT

Exhibit C - JUDGMENT

Exhibit D - ORDER

MAILED TO

JOHN S. GROAT
DEPARTMENT OF JUSTICE
550 11th Street, N.W.
Washington, D.C. 20530

UNITED STATES COURT OF CLAIMS
717 Madison Place, N.W.
Washington, D.C. 20005

DECLARATION OF SERVICE
BY MAIL

I am a citizen of the United States and a resident of Sacramento County, California. I am over the age of eighteen years and not a party to the within above entitled action. My business address is 2230 L Street, Sacramento, California 95816. On this date I served the foregoing document, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed in the manner set forth immediately above this declaration.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at Sacramento, California on 9-11-85

UNITED STATES COURT of APPEALS

for the FEDERAL CIRCUIT

OPINION ANNOUNCING

JUDGMENT OF THE COURT

OPINION FILED AND JUDGMENT ENTERED:

May 31, 1989

The attached opinion announcing the judgment of the court in your case was filed today. The judgment was also entered pursuant to Rule 36. The mandate will be issued in due course.

Costs may be recoverable under Rule 39 or as the court may have directed in the opinion. A party entitled to costs is provided with a bill-of-costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs when taxed are payable to the

EXHIBIT 4

party awarded its costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Exhibits and visual aids shall be promptly retrieved by the party that lodged them with this court.

FRANCIS X. GINDHART

Clerk

WATSTEIN V US, 89-1100

(CLM - 680-86C)

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

89-1100

PAUL G. WATSTEIN,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: May 31, 1989

Before MAYER, Circuit Judge, SKELTON, Senior Circuit Judge, and MICHEL, Circuit Judge.

PER CURIAM.

DECISION

The judgment of the United States Claims Court, No. 680-86C (Sept. 21, 1988), denying Paul G. Watstein's claim for back pay, is affirmed.

OPINION

A prerequisite for commissioning is that the individual take the oath of office and execute AF Form 133 in accord with Air Force Regulation 36-39 (May 12, 1978). It is not enough that Watstein participated in a mass commissioning ceremony and that his AF Form 133 was prepared. See Goutos v. United States, 552 F.2d 922, 925 (Ct. Cl. 1976) ("an appointment is not made until the last act required by the person or body vested with the appointment power is performed"). There was no evidence before the Air Force Board for the correction of Military Records or the

Claims Court that the AF Form 133 was ever executed or that he took th required oath. Accordingly, the government's summary judgment motion was appropriately granted.

In the United States Claims Court

No. 680-86 C

PAUL G. WATSTEIN

v. JUDGMENT

FILED SEP 21 1988

THE UNITED STATES

Pursuant to the order of September 21, 1988, directing dismissal of the complaint,

IT IS ORDERED AND ADJUDGED this date, pursuant to rule 58, that the complaint is dismissed. No costs.

Frank T. Peartree

Clerk of Court

September 21, 1988 By: Linda A. Eddins

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Effective May 1, 1987, RUSCC 77(k)(2) is amended to read: "Filing Notice of appeal.....$105.00

EXHIBIT D

(includes $5.00 fee for notice of appeal and $100.00 Court of Appeals filing fee)".

In the United States Claims Court

PAUL G. WATSTEIN,

Plaintiff,

v. No. 680-86C

THE UNITED STATES, (Filed Sept. 21, 1988)

Defendant.

_____/

ORDER

This case is before the court on remand "to recanvass the laches defense in the light of the correct rules." Watstein v. United States, No. 87-1472, slip op. at 3 (Fed. Cir. Dec. 18, 1987) (unpubl.).

FACTS

Defendant moved for summary judgment on two grounds: the affirmative defense of laches and the merits. the trial court ruled for defendant on the merits. The laches defense insofar as it rested on a presumption of prejudice was not

ruled on. However, the court did rule that defendant's showing of actual prejudice in the form of monetary prejudice was insufficient. Watstein v. United States, No. 680-86C, slip op. at 3 (Cl. Ct. May 29, 1987) (unpubl.). The appeals court did not pass on the merits. In its order remanding the case, the Federal Circuit stated:

> Though the government also expressly raised (in its motion for summary judgment) "such problems as difficulty in finding potential witnesses and documents, difficulty in reviving faded memories, or paying for services not performed" (App. App. 16), the court did not advert to those problems. This was error. . . .

Watstein, No. 87-1472, slip op. at 2-3 (citing Pepper v. United States, 794 F. 2d 1571, 1574-75 (Fed. Cir. 1986)).

The briefing before the trial court

on the laches defense, including the parties' statements of fact, consists of 13 pates, which, according to defense counsel, were reproduced in the materials before the appellate court. In its moving brief, as the Federal Circuit pointed out, defendant asked that prejudice be presumed. Defendant also argues that it had suffered actual prejudice in the form of monetary prejudice. In its opposing brief, plaintiff countered by arguing that manifestations of presumed prejudice, such as fading memories, were inapplicable in this case and argued against the assertion of monetary prejudice. In its reply brief, defendant argued for the first time that it had also suffered actual nonmonetary prejudice in the form of its inabiilty to locate "highly relevant documents" and offered the Declaration of Captain Steven

J. Pecinovsky, Mar. 27, 1987, defendant's of counsel throughout the proceedings, attesting to the absence of records that would have indicated whether plaintiff had been commissioned as a second lieutenant.

Thus, after defendant's reply brief was on file, the case was ready for decision on defendant's affirmative defense dealing with monetary prejudice and on the merits, but it was not ready on the defense of non-monetary prejudice, because the court could not pass on the averments of capt. Pecinovksy's declaration without affording plaintiff an opportunity to file a sur-reply. The rules of this court do not call for sur-replies. RUSCC 83.2. Consistent with RUSCC 1(a) (2) ("These rules shall be construed to secure the just, speedy, and inexpensive determination of every action. . . .") and RUSCC 77.1(a)

("Each judge shall manage assigned cases so as to provide for the prompt dispatch of business . . . ."), the court ruled on the issue of monetary prejudice * / and on the merits, both of which had been briefed fully. The court did not rule on the laches defense dealing with non-monetary prejudice, which would have required further briefing.

There is no rule of court or case law that requires a trial court to allow a response to evidence offered for the firt time on relpy unless 1) the evidence constitutes a new argument that was unavailable previously or 2) the court intends to rely on the new evidence in making its ruling. See CIA Petrolera Caribe, Inc. v. Arco Caribbean, Inc., 754 F. 2d 404, 410 (1st Cir. 1985) (improper for the trial court ot rely on unrebutted "new material" advanced in the reply brief); accord Seglin v. Esall, 769 F. 2d

1274, 1277 n.1 (7th cir. 1985) ("[I]f we were to consider such new material, the opposing party would have to be

---

1/ The record was complete on the issue of monetary prejudice because both parties had addressed each other's arguments and evidentiary showings. However, the court ruled that defendant's showing was insufficient under the RUSCC 56(c) requirement for establishing entitlement to summary judgment since defendant made factual assertions unsupported by evidence. See Watstein, No. 680-87C, slip op. at 3.

given an opportunity to file a supplemental brief in response. The possibilities for continued briefing become endless. . . ."); Autovox, S.p.A. v. Lenco Italiana, S.p.A., 208 U.S.P.Q. 412, 415 (N.D. Ill. 1980) (trial court refuses to address new

material on reply that supported issue raised in party's earlier memorandum). Neither of these factors obtained in this case. During a status conference after the remand issued, the parties were requested to explain how the record was presented on appeal such that the appellate court apparently was not aware that defendant's declaration was offered on reply. Defense counsel stated that the Government had asked for an affirmance based on laches and apologized if this approach had contributed in any way to not making the status clear to the appellate court.

Also after the remand issued, the Federal circuit recanted the presumption of prejudice in Cornetta v. United States, 851 F.2d 1372 (Fed. Cir. 1988) (en banc). In view of this new wrinkle, the parties were asked to suggest a course of proceedings. It was agreed

that plaintiff would respond to Capt. Pecinovsky's declaration, and everything else defendant had argued on laches, and that defendant would file a further responsive brief. The supplemental briefing has been received. It is found that defendant has demonstrated by the March 27, 1987 Pecinovsky declaration actual non-monetary prejudice in the form of the inability to locate a log book, which would have documented the preparation of a completed form SF 133 reflecting that plaintiff had been commissioned, or an amendment to Special Order AH-0874 removing plaintiff's name from the list of individuals to be commissioned as a second lieutenant. Moreover, plaintiff has failed to counter this showing as required by RUSCC 56(f).

CONCLUSION

Based on the foregoing, defendant's motion for summary judgment is granted

based both on the affirmative defense of laches and on the merits, for the reasons set forth in Watstein, No. 680-86C, slip op. at 3-4, and the order entered on June 28, 1987, and plaintiff's cross-motion is denied. The Clerk of the Court shall dismiss the complaint.

IT IS SO ORDERED.

No costs.

Christine Cook Nettesheim
Judge

United States Court of Appeals for the

Federal Circuit

87-1472

PAUL G. WATSTEIN,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

Judgment

ON APPEAL from the U.S. Claims Court

in CASE NO(S). 680-86 C

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

VACATED and

VACATED and REMANDED.

ENTERED BY ORDER OF THE COURT

DATED DEC 18 1987

Francis X. Gindhart,
Clerk

ISSUED AS A MANDATE: JAN 13 1988

EXHIBIT

Note: This opinion has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

87-1472

PAUL G. WATSTEIN,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: December 18, 1987

Before DAVIS, Circuit Judge, BENNETT, Senior Circuit Judge, and MAYER, Circuit Judge.

DAVIS, Circuit Judge.

DECISION

The decision of the United States Claims Court, granting appellee's motion for summary judgment, is vacated and the case is remanded to that court to reconsider the defense of laches.

OPINION

Claiming that he was commissioned as a second lieutenant after attending officer's training school (OTS) but was thereafter unlawfully decommissioned, appellant applied for relief to the Air Force Board for the Correction of Military Records (AFBCMR). Relief was denied. Appellant then sought review of that administrative decision in the Claims Court. On cross-motions for summary jdugment, the court rejected the Government's defense of laches but held that the AFBCMR had not erred.

In our view, whatever the holding

should be on the merits, the Claims court misapplied the inintial defense of laches. Watstein knew by March 21, 1980 that he had been disenrolled as an OTS student and that the Air Force did not consider him commissioned. He was then honorably discharged from the Air Force on June 3, 1981. He filed his suit in the Claims Court on October 27, 1986. This was about five-and-one-half years after he was discharged and about six-and-one-half years after he became aware of the facts on which he founds his current claim. Though he pursued administrative remedies during a lesser part of this period, the Claims Court properly found that the time of delay was too long in the period during which he was not seeking an administrative remedy. Gentry v. United States, No. 175-79C (Ct. Cl. Oct. 17, 1980); Brundage v. United States, 504 F.2d 1382, 1386 (Ct. Cl.

1974), cert. denied. 421 U.S. 998 (1975).

However, the court found no prejudice to the Government because the latter's showing of monetary prejudice was thought to be insufficient. Though the Government also expressly raised (in its motion for summary judgment) "such problems as difficulty in finding potential witnesses and documents, difficulty in reviving fading memories, or paying for services not performed" (App. App. 16), the court did not advert to those problems. This was error. We held in Pepper v. United States, 794 F.2d 1571, 1574-75 (Fed. Cir. 1986):

The longer the delay by a plaintiff in filing suit, the less need there is to search for specific prejudice and the greater the shift to plaintiff of demonstrating lack of prejudice. Deering v. United States, 223 Ct. fails to meet

this burden in a meaningful way, it may manifest from undue delay. Wilmot v. United States, Milona & Sons, 726 F.2d 734, 742 (Fed. cir. 1984), that a delay exceeding 6 years is presumptively injurious and therefore prejudicial. . . . . the prejudice to be presumed from undue delay may include such problems as difficulty in finding witnesses and in some situations, the paying of two salaries for one position or the paying for services not performed. Adkins v. United States, 228 Ct. C1. at 912-13.

This is a case in which the problems of the difficulty in reviving fading memories and retrieving documents are particularly important. The existence and history of the AF Form 133 applicable to appellant are still unknown, and the over-six-year period since the events of the alleged illegal decommissioning have

apparently left no persons with relevant memories of those events. See Adkins v. United States, 228 Ct. Cl. 909, 912 (1981). Moreover, the long period before suit was begun necessarily invokes the prejudice of paying for services not actually performed.

Accordingly, we remand this case to the Claims Court to recanvass the laches defense in the light of the correct rules.

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439
FRANCIS X. GINDHART
CLERK
DEC 18, 1987
TELEPHONE: 633-6550
AREA CODE 202

NOTICE TO COUNSEL

The Court today announced its decision in the attached appeal or appeals.

A copy of the Court's opinion or opinions is enclosed, and judgment thereon has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Costs may be recovered (by Petitioner or Respondent) as provided by Rule 39, Federal Rules of Appellate Procedure.

If sanctions have been imposed, please make check payable to the U.S. Treasury and forward same to the opposing attorney of record.

Very truly yours,

Francis X. Gindhart, Clerk

By Spencer C. Greene
Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20430
FRANCIS X. GINDHART
Clerk

April 13, 1987

TELEPHONE: 633-4550
AREA CODE 202

NOTICE

Limitation on Costs

The court has directed that the costs taxed under FRAP 39 will be limited to the costs of preparing typewritten briefs (even though the brief has been printed) and of copying briefs and appendices.

The following rates will be the maximum allowable costs for the balance of calendar year 1987:

$ 6.00 per page for the table of designated materials, the originals of briefs, and the table of contents for the

appendix (printed, typewritten or word-processed).

$ 0.08 per page for copying and collating.

$ 2.00 per copy for covers and binding.

Costs may be billed for 16 copies of briefs and appendices, plus 2 copies for each additional party, plus any additional copies required or allowed (e.g., confidential briefs or appendices). The cost of service copies of the table or physical compilation of the designated materials may also be billed.

Francis X. Gindhart
Clerk

In the United States Claims Court

PAUL G. WATSTEIN,

Plaintiff,

v. No. 680-86C

THE UNITED STATES, (Filed May 29, 1987)

Defendant.

_____/

ORDER

This military backpay case comes before the court on cross-motions for summary judgment.

FACTS

Plaintiff Paul G. Watstein ("plaintiff") re-enlisted in the United States Air Force on February 1, 1978, and served until his honorable dishcarge on June 3, 1981. Plaintiff had previously served on active duty from August 2, 1972, until November 24, 1976. Plaintiff claims he is entitled to backpay in the amount of $10,898.78 for active duty and

EXHIBIT D

$26,063.85 for amounts which have accrued since his retirement. Plaintiff's contention is that he was commissioned a second lieutenant, but has only been compensated at the staff sergeant (E-5) rate.

Plaintiff attended officer's training school ("OTS"), where on February 13, 1980, he failed satisfactorily to complete a running test. On February 14, 1980, he attended the graduation ceremony for OTS. However, because of the running incident demonstrating what was viewed as unprofessional conduct, he was recommended for disenrollment by the Faculty Board on February 28, 1980. The OTS commander approved the recommendation.

On January 24, 1980, plaintiff was transferred to Mather AFB, Sacramento, California. Upon his arrival on March

21, 1980, he was informed that he had been administratively disenrolled. Nonetheless, plaintiff continued to wear the rank of second lieutenant until April 4, 1980, when he was advised that he was not a commissioned officer and was directed to surrender an identification card indicating his second lieutenant rank. On April 4, 1980, plaintiff filed a complaint with the Inspector General requesting a correction in his record reflecting his rank as a second lieutenant. The request was denied on April 17, 1980. Plaintiff was honorably discharged on June 3, 1981.

Plaintiff took no further action until January 16, 1983, and April 3, 1983, at which time he applied to the Air Force Board for the Correction of Military Records (the "AFBCMR") for correction of his records to reflect his rank as a second lieutenant. This

request was denied on August 30, 1983. Plaintiff filed his complaint in this court on October 27, 1986.

DISCUSSION

1. Laches

a. Inexcusable delay

Responding to defendant's interposing the bar of laches, plaintiff contends that the equitable doctrine is not proper in this case, because he consistently has pursued this matter from his initial notification up until the present. This case came to court six years and seven months after plaintiff's notification of administrative disenrollemnt and five years and four months after his honorable dishcarge from the Air Force. It is recognized that during this period plaintiff did pursue administrative remedies; however, there are significant intervals of time in

which he took no action.

If the court considers the time from the denial of his request by the Inspector Genreal until plaintiff applied to the AFBCMR, over two and one-half years passed. Even if the date of discharge were considered as a starting point, there would still be a period wherein no action was taken of almost two years. If the court were to find that plaintiff was pursuing administrative remedies until August 30, 1983, when his request for correction was denied by the AFBCMR, the over three-year period of delay in coming to court was too long because delay is cumulative. See Gentry v. United States, 225 Ct. Cl. 654, 650 F.2d 290 (1980) (pursuit of permissive remedy unacceptable when total delay was three years two months). Put another way, plaintiff sought administrative relief for eight months out of a five-

year four-month period since his discharge. This delay is too long. Brundage v. United States, 205 Ct. Cl. 502, 509, 504 F. 2d s1382, 1386 (1974), cert. denied, 421 U.S. 998 (1975).

Plaintiff may cure the delay by "a showing of special or extenuating reasons for its cause," Park v. United States, 10 Cl. Ct. 790, 792 (1986) (citing cases). However, there is nothing to indicate such circumstances existed. In these circumstances plaintiff unreasonably delayed in filing suit.

b. Prejudice to defendant

Defendant argues that the length of delay in pursuing this action warrants a presumption that it has been prejudiced. In determining prejudice, the period of consideration is the total period plaintiff delays in filing from the time he was put on notice of a possible claim, e.g., when plaintiff was informed on

March 21, 1980, of his disenrollemnt for OTS. See Talley v. United States, 6 Cl. Ct. 807 (1984). Although a significant period of time has elapsed, it merely shifts to plaintiff a greater burden in showing lack of prejudice. Park, 10 Cl. Ct. at 792; Brundage v. United States, 205 Ct. Cl. at 509, 504 F.2d at 1386. However, shifting the burden to plaintiff does not relieve defendant from making a minimal showing of actual prejudice. Park, 10 Cl. Ct. at 792.

Defendant's assertion that actual prejudice has been demonstrated because of the monetary damages requested is not dispositive. According to plaintiff, the Government would suffer a judgment not exceeding $10,898.78 for plaintiff's services while on active duty. Cf. id. at 793 ($19,000 held not to be significant monetary prejudice. However, plaintiff fails to substantiate the

amount of alleged prejudice as required by RUSCC 56(f), and defendant contests plaintiff's unsubstantiated assertion. On this record the court can find neither some showing of prejudice by defendant, nor its rebuttal by plaintiff.

2. Merits

The basis for plaintiff's claim on the merits is that since he was duly commissioned officer at the time he was notified of his disenrollment from OTS, the decision of the Faculty Board was a nullity. The AFBCMR found that plaintiff's attendance at a commissioning ceremony did no result in his being commissioned. Defendant argues that the decision of the AFBCMR was based upon the Faculty Board's decision and its own interpretation of the applicable statutes and regulations.

As was stated in Sanders v. United States, 219 Ct. Cl. 285, 298, 594 F.2d

804, 811 (1979):

Once a plaintiff has sought relief from the Correction Board, such plaintiff is bound by that board's determination unless he can meet the difficult standard of proof that the Correction Board's decision was illegal because it was arbitrary, or capricious, or in bad faith, or unsupported by substantial evidence, or contrary to law, regulation, or mandatory published procedure of a substantive nature by which plaintiff has been seriously prejudiced, and money is due.

(Citations omitted.)

Plaintiff has failed to making a showing that the AFBCMR acted in violation of law or Air Force regulations. Indeed, Air Force Reg. 36-39, para. 5 (May 12, 1978), establishes that a comission must be evidence on AF Form 133. It is undisputed that

plaintiff's military records do not contain an AF Form 133. The court has examined the record extracts and finds no indication that the form was ever executed or that it had been included in plaintiff's records at any time.

The decision of the AFBCMR was not claimed to be arbitrary and capricious, but plaintiff contends that it was a nullity because he was already commissioned. Plaintiff offers no proof to support this contention, nor does plaintiff show that attendance at and participation in a commissioning ceremony suffices to make him a commissioned officer. The record of proceedings before the AFBCMR reveals that its decision was based on a finding that plaintiff was never commissioned. The AFBCMR's interpretation of the regulation is "entitled to judicial deference," Wronke v. Marsh, 787 F.2d 1569, 1576

(Fed. Cir.). cert. denied, 107 S. Ct. ;188 (1986); Udall v. Tallman, 380 U. S. s1, 16 (1965), especially when plaintiff makes no factual or legal showing to support his position.

CONCLUSION

The AFBCMR's decision has not been shown to be in error. Although plaintiff's claim is not barred by the equitable doctrine of laches, he has failed to substantiate any claim on the merits under the exacting standard governing review of correction board decisions. Based on the foregoing,

IT IS ORDERED, as follows:

Defendant's motion for summary judgment is granted. Plaintiff's cross-motion is denied, and the Clerk of the Court shall dismiss the complaint.

No costs.

Christine Cook Nettesheim
Judge

DEPARTMENT OF THE AIR FORCE

Headquarters US Air Force

Washington DC 20330

AF REGULATION 36-39

12 MAY 1978

Officer Personnel

AF FORM 133, OATH OF OFFICE (MILITARY PERSONNEL)

This regulation requires persons appointed as officers in the Air Force to complete AF Form 133, Oath of Office (Military Personnel). It also explains how the oath is administered, authenticated, and filed.

This publication is affected by the Privacy Act of 1974. Each form that is subject to the provisions of AFR 12-35, paragraph 30 and required by this publication contains a Privacy Act Statement, either incorporated in the body of the document or in a separate statement accompanying each such

EXHIBIT E

documents.

Proposed supplements that affect any military personnel function performed at MAJCOM level or below are processed as prescribed in AFR 5-13.

1. Legal Requirements. Persons elected or appointed to an office of honor or trust under the Government of the United States are required to take and subscribe to the oath prescribed by 5 U.S.C 3331 before entering upon the duties of such office. (Officers are not required to take the oath on promotion (see 10 U.S.C 8312, 8394, and 8451).)

2. Who Takes the Oath. Persons being appointed or commissioned in the Regular Air force, the United States Air Force (Temporary), or Reserve of the Air Force, execute AF Form 133 at the time the appointment or commission is accepted. (Complete form in original only, preferably by typewriter, and return it

to the headquarters tendering the appointment or commission. See paragraph 5 for filing instructions.)

3. Administers the Oath. Person being appointed or commissioned in the Air Force may take the oath before a:

a. Civil official authorized by law to administer oaths;

b. Commissioned officer of any component of any Armed Force of the United States (includes Reserve components), whether on active duty or not. (This includes commissioned warrant officers of the Navy, Marine Corps, and Coast Guard.);

c. Warrant officer serving as adjutant, assistant adjutant, or personel adjutant of a command; or

d. Warrant officer of the Air force serving as director, deputy, chief of administration, administration officer or similar title.

NOTE: Warrant officers of the Air Force must state their duty position and add the following statement to the signature element: "Authorized to administer oaths and act as a notary under 10 U.S.C. 936 and AFR 110-6."

4. Authenticating the Oath. If a civil official administers the oath, AF Form 133 must bear the official seal. If there is no seal, the signature and authority to administer oaths must be verified and authenticated under seal by the clerk of a court of record or other appropriate official.

NOTE: If a notary administers the oath, the expiration date of his or her commission must be included (if required by the State concerned) and the AF Form 133 must bear the notarial seal or indicia.

5. Filing the Oath. AF Form 133 is sent to the custodian of the officer's Master

Personnel Record Group for filing according to AFR 35-44, table A1. Location of the various Master Personnel Groups is shown in AFR 35-44, table 1-3.

Supersedes AFR 36-39, 6 April 1973. (For summary of revised, deleted, or added material, see signature page.)

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HQ REFERENCE 1

MAILED TO:

JOHN S. GROAT

DEPARTMENT OF JUSTICE

550 11th Street, N.W.

Washington, D.C. 20530

UNITED STATES COURT OF CLAIMS

717 Madison Place, N.W.

Washington, D.C. 20005